NO. 46832-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Appellant

v.

SEAN MICHAEL TAUL, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01278-1

BRIEF OF APPELLANT

Attorneys for Appellant:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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III. The trial court erred, and abused its discretion, when it dismissed counts 1 and 2 without considering any other intermediate remedies prior to dismissal.

IV. The trial court erred when it dismissed counts 1 and 2.

B. ISSUES PRESENTED

I. Pursuant to CrR 8.3(b), CR 6(d), and CrR 8.1, the State must be afforded proper notice prior to a hearing to dismiss under CrR 8.3(b). The State received no notice of the hearing to dismiss under CrR 8.3(b) in this case where the defendant filed the motion and memorandum the morning of trial and the trial court heard argument and ruled on the motion that same morning.

II. A trial court cannot dismiss a case or counts under CrR 8.3(b) if it does not find that the State engaged in arbitrary action or governmental misconduct. The trial court in its lengthy Findings of Fact did not find that the State engaged in arbitrary action or governmental misconduct, but still dismissed counts 1 and 2 pursuant to CrR 8.3(b).

III. The record of the hearings does not support the contention that the State engaged in arbitrary action or governmental misconduct.

IV. A trial court cannot dismiss a case or counts under CrR 8.3(b) if it does not conclude that there was prejudice affecting the defendant's right to a fair trial. The trial court applied the wrong legal standard when it determined that the defendant was prejudiced and made no Conclusion of Law that there was prejudice affecting the defendant's right to a fair trial.

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C. STATEMENT OF THE CASE

Sean Taul was charged by amended information with Residential Burglary and Assault in the Fourth Degree for an incident occurring on or about June 29, 2014. Supp. CP 34-35. Both of those offenses were charged with the special allegation of domestic violence. Supp. CP 34-35. In addition, Mr. Taul was charged with Bail Jumping on a Class B or C Felony for missing court on or about July 23, 2014. Supp. CP 34-35. Following Mr. Taul's original arraignment, future court dates were set to include an omnibus hearing on July 23, 2014, a readiness hearing on September 25, 2014 and a trial date of September 29, 2014. CP 18. Prior

to Mr. Taul's readiness hearing, his attorney filed a citation placing him on the change of plea docket for September 22, 2014, but Mr. Taul did not end up pleading guilty. CP 6, 9; Supp. CP 40-41. Mr. Taul was next placed on the September 24, 2014 change of plea docket. CP 9; Supp. CP 40-41. Once again he did not end up pleading guilty. Thus, on September 25, 2014, both parties appeared for the readiness hearing and called the case ready for trial, which was scheduled for September 29, 2014. CP 10, 18.

On September 29, the day originally set for trial, the State moved for a continuance because the primary officer in the case was unexpectedly very ill. RP 2; CP 1-2, 18. The officer had taken witness statements, photographs of the injuries, helped complete the victim's *Smith* affidavit, and interviewed the defendant. RP 16, 18; CP 18. The officer had been planning on coming in to testify as scheduled, confirmed that with the State prior to the trial date, and called the State the morning of the trial explaining that she was now too ill to attend. RP 6-7; CP 18-19. The trial court found that the officer was a material witness, there was good cause for the continuance, and continued the trial to the next day. RP 18-19, 36, CP 21-22.

In arguing for the continuance the State noted that because Mr. Taul had failed to appear at his omnibus hearing on July 23, 2014 and next

appeared on July 25, 2014 that there was still about 30 days left in Mr. Taul's speedy trial period. RP 3-5; CP 18-19. There was no serious contention that this was incorrect. RP 19-21; CP 18-19. Nevertheless, when the court continued the trial to the next day, that trial date was within the original speedy trial period wherein about 10 days still remained. RP 2-3.

During the course of the argument as to whether the continuance should be granted, the defendant's trial counsel told the court that he had personal knowledge that the alleged victim had not been served and stated that the alleged victim's mother had called him that morning reporting that she had already been called off by someone in the prosecuting attorney's office. RP 8; CP 20. The State made the following attempts to address that topic without success:

> [STATE]: If I might make a record as to the discussion. I was the person who spoke to - -
>
> THE COURT: Hold on - -
>
> [STATE]: Ms. Green today.
>
> THE COURT: Hold on. One thing at a time, you guys are jumping [to] too many things.

RP 9-10; CP 20-21.

> THE COURT: Very well. So the next matter is the continuance based upon the unfortunate illness of the investigating officer; is that correct?

[STATE]: Correct, Your Honor. If I might just make a brief record. I was the person who spoke to the alleged victim's mother.

THE COURT: I'm not going to get into what he-said/she-said –

[STATE]: Okay.

THE COURT: -- I want to stick to the legal arguments with respect to –

[STATE]: I just wanted to make –

THE COURT: -- the continuance.

[STATE]: Okay.

RP 11; CP 20-21.

THE COURT: Is the alleged victim here and will she be testifying today?

[STATE]: I told them to wait until we called them to let them know, Your Honor, but I –

THE COURT: Very well. Hold on, so -- And then you indicate that the victim, alleged victim may have had a couple inconsistent statements regarding this matter?

[STATE]: The defendant, Your Honor.

RP 26; CP 22. The State also commented that it did have "the affidavit of service for Ashley Anderson, Benjamin Anderson --" before the trial court jumped in to once again to state that it only wanted to hear about the service of the officer. RP 12-13; CP 21. The trial court, in fact, made it

clear to both parties that he only wanted to hear argument as it related to the officer. RP 13, 15, 18-19, 33-34, CP 20-21.

On September 30, 214, the very next day, the State indicated that it was ready to proceed to trial, but that it wanted a brief recess to speak with the victim "to figure out time-wise" when she should appear. RP 38, 42; CP 22. The State informed the court that victim was presently in the courthouse and had been personally served, but was down in District Court making a court appearance in a case in which she was the defendant. RP 42, 45; CP 22-23. At that point, Mr. Taul handed up a motion to dismiss for prosecutorial mismanagement while stating "I know nobody's seen the motion yet, I just handed it up, I just handed it [to the State]." RP 42-43; CP 3-12, 23. Mr. Taul complained that on September 29 the State had said that victim was served over the weekend, but in speaking with the victim on September 30 and looking at the subpoena it was clear to him that the victim had only been served the morning of September 30. RP 43, CP 23. The following colloquy then occurred:

> [STATE]: Yes, Your Honor. She was served this morning, as I just said. I don't believe I ever put on the record that she was personally served over the weekend. Her subpoena was mailed to her mother's house, and I believe this is what I put on the record. Her mother confirmed on the phone that she had her subpoena there and that -- and I believe I put this on the record as well -- and we can listen to the record, Your Honor, but I do not believe I ever represented to this

Court that she was personally served over the weekend. She was personally served this morning.

THE COURT: I'm not sure. You may have – you may have led this Court to believe that all the witnesses had been served because Mr. [Taul] at some point during the process indicated that he felt the alleged victim had not been served.

[STATE]: And if I'm remembering correctly, I -- you know, I believe that we stopped on that inquiry because you wanted us to focus on the officer. So if I remember correctly, when we tried to go to making more thorough -- more thorough records on that matter, we were limited to just the officer. *I was prepared yesterday if the victim didn't show up, we would have proceeded on the bail jump, which does also require the officer*. However, Your Honor, these situations are very fluid in DV cases.

RP 44-45; CP 23-24 (emphasis added).

Following the above conversation, the trial court said to the State:

THE COURT: I don't -- I don't believe you stated that she had been served, counsel, but the Court was led to believe that she had been served. Regardless, that goes to your integrity and professionalism in this particular court. It will not happen again.

[STATE]: And I greatly apologize, Your Honor.

THE COURT: Let me finish. Let me finish, counsel. When you come into this particular court or any court, whether it's Clark County or any other jurisdiction, you lay out the facts honestly and truthfully without trying to hedge one way or the other. These cases are not that important to your career one way or the other. State the truth, because when Mr. [Taul] indicated yesterday that he challenged whether or not witnesses had been served, I was led to believe -- whether I'm incorrect or not -- that all the witnesses had been served. Now Mr. [Taul] indicates that the witness had

> not been served, so that goes to your integrity with this courtroom. I will let it go this time. I will not let it go a second time. Understood?
>
> [STATE]: Understood, Your Honor. And I apologize, it was –
>
> THE COURT: No explanations.
>
> [STATE]: -- not my intention –
>
> THE COURT: No apologies needed. You've been significantly addressed and admonished in this particular courtroom regarding honesty, integrity and credibility. Understood?
>
> [STATE]: Yes, Your Honor.

RP 46-47; CP 25. At this point, the court indicated that it was going to deny Mr. Taul's motion, but Mr. Taul requested to be heard on it and the trial court acceded, grabbing the motion and indicating a need to read it. RP 47-48; CP 25.

Mr. Taul's trial counsel argued that "now we clearly know that the prejudice to my client is that he is facing two charges that he would not have faced yesterday." RP 48-49; CP 25. After additional discussion on whether the victim was personally served, the court remarked to the State:

> THE COURT: You could have said yesterday that we don't know if she's gonna [sic] show up. That's what you could have said: I don't know if she's gonna [sic] show up. I'm inclined -- I tend to believe Mr. [Taul] at this particular time because instead of just telling the Court yesterday, we don't know if the alleged victim, complaining witness, will be present in court to testify, we somehow bootstrapped the

> illness of the officer to allow the Court to find a reasonable, rational basis to set this matter over. If we proceeded yesterday without the complaining witness, the only charge that you probably could have proven would have been the bail jump, if that. That's my understanding. . . So, yes, there is prejudice to Mr. Taul. The Court was led to believe that the complaining witness, the alleged victim, was indeed scheduled[1] to appear yesterday for testimony against this particular defendant."

RP 53-54; CP 28. The trial court then read aloud RPC 3.3 – Candor Toward the Tribunal before urging the parties "to go into that breezeway and start discussing this case in a professional manner regarding all of the issues before you, before I make a ruling." RP 54-56. The trial court stated that it was "not putting pressure on anybody" but it wanted to give the parties a chance to "look at the facts clearly . . . and rationally see if you can resolve this case." RP 56. It then reiterated "I just want to make sure both parties understand this Court was led to believe that the complaining witness was *present and ready to testify*." RP 56 (emphasis added).

The State then attempted to make a record as to what had in fact happened the day before and explained to the trial court that she had no intention of misleading the court and that she had tried to make a better record regarding the issues that were raised but that the trial court would

[1] The victim was scheduled to testify and as the record makes clear the State had been in contact with her mother regarding the subpoena itself and the need for them to appear on September 29 for trial as scheduled unless a continuance was granted as result of the illness of the officer. RP 26, 42-52, 61.

not allow her. RP 57-63. Even Mr. Taul conceded that "regarding the record, I would agree that I think [the State] intended to put other stuff on the record and she wasn't allowed to." RP 63. Throughout the September 30 proceeding the State also attempted to explain to the court that it is often the situation in cases of domestic violence that one cannot be sure whether a victim will show up to testify against her abuser until the moment she is scheduled to testify and that prosecutors are aware of this fact when taking these cases to trial. RP 45, 52, 59, 61; CP 28.

In response, the court once again complained:

> THE COURT: I was led to believe that she [(the victim)] would be testifying yesterday. That's what the Court was led to believe, that she would be present during yesterday's proceedings to testify against this particular defendant. I never once asked if she was personally served. I don't recall that. But this Court was just merely led to believe that the alleged victim, complaining witness would be present to testify against this defendant. That's what the Court was led to believe, nothing more, nothing less, and that was my impression.

RP 65; CP 30. The two parties then exited the courtroom but were unable to resolve the case. RP 65-66. Upon re-entering the courtroom, the trial court ruled on defendant's motion to dismiss under CrR 8.3(b). RP 66-70. In framing the issue the trial court stated "[t]he question before the Court is whether or not there was prejudice in the setover [sic] of yesterday's trial date from September 29th, 2014, to September 30th, 2014." RP 66.

The court then re-summarized its beliefs regarding what it had been led to believe regarding the status of the victim on September 29, that it was only the officer's unavailability that would lead to the good cause basis for the one day set over, and held that "when the alleged victim . . . and the investigating officer are not present to testify, there would be prejudice to the defendant." RP 66-68; CP 30-31. The court then granted the motion to dismiss counts 1 and 2 under CrR 8.3(b). RP 69; CP 13; 31. The State released its witnesses who were present for trial on the domestic violence offenses and the parties would eventually continue to trial on the bail jump charge. RP 70.

D. ARGUMENT

1. The trial court erred when it dismissed counts 1 and 2 pursuant to CrR 8.3(b) because (1) it failed to afford the State proper notice and hearing prior to dismissing; (2) it failed to find arbitrary action or governmental misconduct prior to dismissing; (3) the State did not engage in arbitrary action or governmental misconduct; (4) it applied the wrong legal standard when it determined that the defendant was prejudiced; (5) it failed to find that there was prejudice affecting the defendant's right to a fair trial prior to dismissing; (6) there was no prejudice affecting the defendant's right to a fair trial; and (7) it abused its discretion when it failed to consider intermediate remedies prior to dismissing.

CrR 8.3(b) states that a trial court "in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to

arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." Notice and hearing is not further defined in CrR 8.3 or in the case law applying CrR 8.3, but pursuant to rules governing the timing of motions a "written motion . . . and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing." CR 6(d); CrR 8.1. Indeed, "in criminal cases there is even more reason than in civil cases for giving less leeway and sway to the motions of 'trial from ambush.'" *State v. Thompson*, 54 Wn.2d 100, 109, 338 P.2d 319 (1959) (Finley, J., concurring).

A trial court's decision to dismiss under CrR 8.3(b) is reviewed for abuse of discretion. *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003); *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A trial court abuses its discretion when its decision to dismiss is "manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *Rohrich*, 149 Wn.2d at 654 (citing *State v. Blackwell*, 120 Wash.2d 822, 830, 845 P.2d 1017 (1993)). A decision is "'manifestly unreasonable' if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take . . . and arrives at a decision outside the range of acceptable choices." *Id.* (internal quotations omitted) (citing *State v. Lewis*, 115 Wn.2d 294, 298–

99, 797 P.2d 1141 (1990) (*State v. Rundquist*, 79 Wn.App. 786, 793, 905 P.2d 922 (1995)). On the other hand, a decision "is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *Id.* (citing *Rundquist*, 79 Wn.App. at 793).

Dismissal under CrR 8.3 is "an extraordinary remedy to which the court should resort only in 'truly egregious cases of mismanagement or misconduct'" by the prosecutor. *Wilson*, 149 Wn.2d at 9 (quoting *State v. Duggins*, 68 Wn.App. 396, 401, 844 P.2d 441, *aff'd*, 121 Wn.2d 524, 852 P.2d 294 (1993)); *City of Seattle v. Holifield*, 170 Wn.2d 230, 237, 240 P.3d 1162 ("Dismissal is an extraordinary remedy, one to which a trial court should turn only as a last resort.") (citation and internal quotations omitted). Notably, a trial court "abuse[s] its discretion by resorting to the extraordinary remedy of dismissing a criminal charge without first considering intermediate and less drastic remedial steps." *State v. Koerber*, 85 Wn.App. 1, 3, 931 P.2d 904 (1996). Approved intermediate steps that a trial court should consider prior to dismissal include the suppression of evidence, the exclusion of a witness's testimony, the release of a defendant from custody, or a continuance of the trial date. *Holifield*, 170 Wn.2d at 237 (citing *State v. Marks*, 114 Wn.2d 724, 730,

790 P2d 138 (1990); *Wilson*, 149 Wn.2d at 12; *Koerber*, 85 Wn.App. at 4 FN 2; *State v. Krenik*, 156 Wn.App. 314, 321, 231 P.3d 252 (2010).

When seeking a dismissal pursuant to CrR 8.3(b) a defendant must show by a preponderance of evidence that there was "(1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial." *State v. Barry*, 184 Wn.App. 790, 797, 339 P.3d 200 (2014) (citing *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997)); *Rohrich*, 149 Wn.2d at 654 (citations omitted). Reviewing courts must presume that the party with a burden of proof cannot sustain their burden on an issue when there is an "absence of a finding on [that] factual issue." *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 180 (1997); *State v. Cass*, 62 Wn.App. 793, 795, 816 P.2d 57 (1991) ("When there is an absence of a finding on a factual issue, it is presumed that the party with the burden of proof failed to sustain their burden on this issue.") (citing *Smith v. King*, 106 Wn.2d 443, 451, 722 P.2d 796 (1986)).

Claimed governmental misconduct "need not be evil or dishonest in nature. . . ." *State v. Martinez*, 121 Wn.App. 21, 30, 86 P.3d 1210 (2004) (citing *Michielli*, 132 Wn.2d at 239). Rather, governmental misconduct can be "something as basic as simple mismanagement." *Barry*, 184 Wn.App. at 187 (citation omitted). Absent a showing of arbitrary action or governmental misconduct, however, a trial court cannot

dismiss charges under CrR 8.3(b) as the rule "'is designed to protect against arbitrary action or governmental misconduct and not to grant courts the authority to substitute their judgment for that of the prosecutor.'" *Michielli*, 132 Wn.2d at 240 (quoting *State v. Cantrell*, 111 Wn.2d 385, 390, 758 P.2d 1 (1988)).

Prejudice affecting a defendant's right to a fair trial under CrR 8.3(b) must be actual prejudice; speculative prejudice or the mere possibility of prejudice is insufficient to meet a defendant's burden. *State v. Kone*, 165 Wn.App. 420, 432, 266 P.3d 916 (2011); *Rohrich*, 149 Wn.2d at 657. Actual prejudice occurs if a defendant is forced to choose between the right to a speedy trial and the right to adequately prepared counsel. *Wilson*, 149 Wn.2d at 13 (citation omitted); *Barry*, 184 Wn.App at 797. On the other hand, "[m]ere expense and inconvenience, or additional delay within the speedy trial period, do not meet this test; the misconduct must interfere with the defendant's ability to present his case." *Chichester*, 141 Wn.App. at 457 (citing *Duggins*, 68 Wn.App. at 401); *City of Kent v. Sandhu*, 159 Wn.App. 836, 841, 247 P.3d 454 (2011). Similarly, actual prejudice does not arise where a case continues to interfere with a defendant's time because "[i]nconvienience and disruption of one's daily life are a necessary consequence of being charged with an offense." *Cantrell*, 111 Wn.2d at 390-91. Crucially, actual prejudice

"*does not* mean merely that if the case went to trial without the continuance, the defendant might be acquitted because of the absence of the witness." *Duggins*, 68 Wn.App. at 401 (emphasis added)

Duggins and *Koerber* are instructive. In *Duggins*, on the scheduled trial date the State moved for a continuance of 1 or 2 days because an officer necessary to prove the charged crime had not responded to his subpoena and was not present to testify. 68 Wn.App. at 397. The defendant objected to the continuance and moved to dismiss because the officer had not been personally served. *Id.* at 398. The trial court granted a two day continuance noting that the new trial date was not beyond the speedy trial period and reserved on the defendant's motion to dismiss. *Id.* The next day a hearing was held in which the State informed the court that the officer had never received the subpoena for the originally scheduled trial date. *Id.* Nonetheless, the trial court denied the defendant's motion to dismiss and the defendant appealed that decision.

Duggins first analyzed the issue by looking at former JuCR 7.8 but turned to CrR 8.3(b), and the rule's associated case law, to confirm its conclusion that a trial court's authority to dismiss is "limited to truly egregious cases of mismanagement or misconduct by the prosecutor. It does not extend to acts of simple negligence, as for example, failing to issue one subpoena involving a 1–day or 2–day delay." 68 Wn.App. at

398-402. When analyzing whether the defendant was prejudiced by the trial court's decision to grant a continuance even though the officer who failed to appear was not subpoenaed by the State, *Duggins* held that prejudice "to a defendant means there is some interference with his ability to present his case, for example, the unavailability of a witness or some substantial additional time in custody awaiting trial. It does not mean merely that if the case went to trial without the continuance, the defendant might be acquitted because of the absence of the witness." *Id.*

In *Koerber*, the night before the trial was to begin, the State was informed that one of its witnesses was sick with the flu. The trial judge determined that because the witness was critical to the State's case, was not presently available, and because the State was unable to advise the court when the witness would be available, the case against the defendant would be dismissed with prejudice for "want of prosecution." 85 Wn.App. at 3. While the trial court stated in dismissing the case that it was not relying on CrR 8.3(b), *Koerber* held that "whether within or outside the confines of the rule . . . the trial court's dismissal order was an abuse of discretion." *Id. Koerber* found that the trial court abused its discretion because it (1) "ignored reasonable alternatives when [it] readily ordered the extraordinary remedy of dismissal" and (2) "dismissed without finding prejudice to [the defendant]." *Id.* at 3-5.

II. The trial court abused its discretion because it failed to give the State proper notice and held an insufficient hearing when it accepted the defendant's motion to dismiss pursuant to CrR 8.3(b) on the day of trial and held an impromptu hearing on whether to dismiss that same day without allowing the State to brief the issues.

Here, on the day of trial and after the State confirmed it was ready to proceed, the defendant filed a motion to dismiss the State's case under CrR 8.3(b) for prosecutorial mismanagement. RP 38, 42-43; CP 3-12. The defendant's motion contained a declaration and factual background by his counsel as well as argument and an attached court docket summary. CP 3-12. CrR 8.3(b) is straightforward in that it is "*after notice and hearing*" that a trial court "may dismiss any criminal prosecution due to arbitrary action or governmental misconduct." (emphasis added). Moreover, CR 6 provides that when a written motion is filed "notice of the hearing thereof *shall be served* not later than *5 days before* the time specified for the hearing, unless a different period is fixed by these rules or by order of the court." (emphasis added). The purpose of notice is clear; litigation by ambush is disfavored and just results are obtained when parties are prepared with proper arguments supported by researched legal authority. To have a hearing in which only one side is prepared is to ensure that only one side's position is fairly presented.

Nevertheless, upon receipt of the defendant's motion, which the defendant admitted "nobody's seen . . . yet," the trial court moved headlong into what was purportedly a hearing on the CrR 8.3(b) motion. RP 43-47. Consequently, the State had no notice of any kind regarding the hearing. Because the State had no notice it was unable to authoritatively rebut the defendant's and trial court's incorrect factual assertions and recollections, and was left, instead, in a position where it could only (1) make arguments couched in statements like if it was "remembering correctly" and (2) plead for the court to "review the record" from the previous day's proceeding. RP 44-45, 57, 60. Moreover, because of the lack of notice the State was unable to brief the legal issues before the trial court and inform the trial court of the applicable case law. In combination with the fact that the defendant's motion was completely bereft of case law, or even the text of CrR 8.3(b), it is no surprise that absent in the hearing, findings of fact, and conclusions of law is any mention of the relevant and controlling case law applying CrR 8.3(b). CP 3-12, 17-31; RP 38-70. Consequently, the trial court abused its discretion in dismissing counts 1 and 2 without giving the State proper notice and a sufficient hearing to contest the CrR 8.3(b) dismissal.

III. The trial court abused its discretion when it dismissed counts 1 and 2 of the State's case pursuant to CrR 8.3(b) without finding that the State engaged in arbitrary action or governmental misconduct

Here, there is no explicit finding, in either the report of proceedings, findings of fact, or conclusions of law that the State engaged in arbitrary action or governmental misconduct. The trial court's conclusion that it was under the impression or led to believe as a result of the State's presentation that the victim was served and ready to proceed by testifying on September 29 is insufficient to support such a finding, because the case law, without qualification, commands that "a defendant *must* make two showings to justify dismissal under CrR 8.3(b): (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial." *Barry*, 184 Wn.App. at 797 (emphasis added); *Rohrich*, 149 Wn.2d at 654 (citations omitted).

Moreover, the burden is on the defendant to make such a showing by a preponderance of the evidence. *Rohrich*, 149 Wn.2d at 654. Because reviewing courts must presume that the party with a burden of proof cannot sustain their burden on an issue when there is an "absence of a finding on [that] factual issue" this court should find that defendant did not meet its burden to show that the State engaged in arbitrary action or governmental misconduct, the trial court did not make such a finding, and,

as a result, the court erred in dismissing under CrR 8.3(b). *Armenta*, 134 Wn.2d at 14; *Cass*, 62 Wn.App. at 795.

Assuming *arguendo* that the court found arbitrary action or governmental misconduct, however, its finding was based on untenable grounds. The issue that so rankled the trial court was it belief, or impression, that victim in this case was subpoenaed and ready to testify on September 29 and that the State, in a dishonest manner, led the trial court to this belief. This misimpression[2] cannot be laid at the feet of the State.

As mentioned above in the Statement of the Case, on September 29, the day originally set for trial, the State moved for a continuance because the primary officer in the case was unexpectedly very ill. RP 2; CP 1-2. The officer had taken witness statements, photographs of the injuries, helped complete the victim's *Smith* affidavit, and interviewed the defendant. RP 16, 18. The officer had been planning on coming in to testify as scheduled, confirmed that with the State prior to the trial date, and called the State the morning of the trial explaining that she was now too ill to attend. RP 6-7. The trial court found that the officer was a

[2] As mentioned, the victim was not personally served, but the record is otherwise unclear as to whether the victim was planning on or eventually did show up on September 29 for trial. The record is clear that the State was in contact in the victim's mother on that morning and was updating her on the necessity of showing up based on the continuance request and that the victim was present in the courthouse the next day (she had her own appearance on a criminal matter that day well). *See generally* RP, RP 61.

material witness, there was good cause for the continuance, and continued the trial to the next day. RP 18-19, 36.

During the course of the argument as to whether the continuance should be granted, the defendant's trial counsel told the court that he had personal knowledge that the alleged victim had not been served and stated that the alleged victim's mother had called him that morning reporting that she had already been called off by someone in the prosecuting attorney's office. RP 8. The State made the following attempts to address that topic:

> [STATE]: If I might make a record as to the discussion. I was the person who spoke to - -
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> THE COURT: Hold on - -
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> [STATE]: Ms. Green today.
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> THE COURT: Hold on. One thing at a time, you guys are jumping [to] too many things.

RP 9-10.

> THE COURT: Very well. So the next matter is the continuance based upon the unfortunate illness of the investigating officer; is that correct?
>
> [STATE]: Correct, Your Honor. If I might just make a brief record. I was the person who spoke to the alleged victim's mother.
>
> THE COURT: I'm not going to get into what he-said/she-said –
>
> [STATE]: Okay.

> THE COURT: -- I want to stick to the legal arguments with respect to –
>
> [STATE]: I just wanted to make –
>
> THE COURT: -- the continuance.
>
> [STATE]: Okay.

RP 11.

> THE COURT: Is the alleged victim here and will she be testifying today?
>
> [STATE]: I told them to wait until we called them to let them know, Your Honor, but I –
>
> THE COURT: Very well. Hold on, so -- And then you indicate that the victim, alleged victim may have had a couple inconsistent statements regarding this matter?
>
> [STATE]: The defendant, Your Honor.

RP 26. The State also commented that it did have "the affidavit of service for Ashley Anderson, Benjamin Anderson --" before the trial court jumped in to once again to state that it only wanted to hear about the service of the officer. CP 21, FF #16; RP 12-13. Had the State been able to finish its explanation or make its record on that point it would have been clear that the State was referring to the portion on the witness subpoenas, which each had a signed declaration or affidavit of mailing. Supp. CP 37-39; CP 26, FF# 47; RP 49-50, 57-58.

Based on the foregoing, and the record in its entirety, it is untenable that the trial court could conclude, after quoting the RPCs that "[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact" that as result of some dishonesty on the part of the State that it "was led yesterday to believe whether intentionally or not that the alleged victim, complaining witness was ready, willing, able to testify and scheduled to appear yesterday at yesterday's proceeding." CP 29, CL# 2, #3(e); RP 55-56.[3] It is equally untenable for the court, on the record before it, to have concluded that the State "bootstrapped the illness of the officer to allow the Court to find a reasonable, rational basis to set this matter over." CP 28, CL #1; RP 53. The full record just does not support the trial court's belief that it was led astray by the presentation of the State especially because the State was continually rebuffed when it attempted to make a record pertaining to these very issues. *See Supra*; RP 2-36.

Moreover, commonsense dictates that the State was not involved in any gamesmanship in order to secure a continuance. Had the State requested a continuance at the September 25 readiness hearing due to the likely unavailability of the victim or any other issues regarding its readiness to proceed to trial, a continuance would have very likely been

[3] Again, the record is not determinative as to whether the victim was going to show up to testify. *See* RP 61, *see also generally* RP.

granted given that (1) this was the first trial setting; (2) the victim was a material witness; (3) there was approximately 30 days left before the end of speedy trial period; and (4) the defendant was scheduled to change his plea to guilty on the day before the scheduled readiness hearing date before changing his mind and calling the case ready for trial. Instead, the State called the case ready because, logically, it was ready to proceed to trial on the scheduled date but for the investigating officer's unexpected last minute illness; the record does not suggest otherwise. This conclusion is buttressed by the fact that the State was ready to proceed to trial the very next day. As a result, any finding of arbitrary action or governmental misconduct rested on untenable grounds and could not support dismissal under CrR 8.3(b).

IV. The trial court abused its discretion when it dismissed counts 1 and 2 of the State's case pursuant to CrR 8.3(b) because its finding of prejudice was made for untenable reasons, applied the wrong legal standard, and because it failed to consider intermediate steps prior to dismissal.

Here, the trial court concluded the defendant was prejudiced because had the trial court known that the victim was not going to show up to testify on September 29—assuming it true—and had not been subpoenaed for trial on that date then it "more likely than not would not have granted" the State's motion to continue and the State would have only been able to

prove the bail jump charge had the case proceeded to trial on September 29. CP 28-31, CL# 1-3; RP 67-69. This conclusion, however, is legally untenable under the case law. As mentioned above, pursuant to *Duggins* prejudice "to a defendant means there is some interference with his ability to present his case, for example, the unavailability of a witness or some substantial additional time in custody awaiting trial. It does not mean merely that if the case went to trial without the continuance, the defendant might be acquitted because of the absence of the witness." 68 Wn.App. at 398-402. A defendant does not suffer actual prejudice when there is merely "additional delay within the speedy trial period" because such a delay does not "affect[] the defendant's right to a fair trial." *Chichester*, 141 Wn.App. at 457; *Barry*, 184 Wn.App. at 797 (citing *Michielli*, 132 Wn.2d at 239). Consequently, the trial court's erred when it concluded that the defendant was prejudiced when his trial was continued for one day without any finding of how that continuance affected his right to a fair trial and/or his ability to present his case.

Moreover, the trial court "abused its discretion by resorting to the extraordinary remedy of dismissing a criminal charge without first considering intermediate and less drastic remedial steps." *Koerber*, 85 Wn.App. at 3. Instead, the trial court only considered dismissal as the remedy for what it believed was misconduct, neglecting to contemplate

case-law approved intermediate steps that include the suppression of evidence, the exclusion of a witness's testimony, the release of the defendant from custody (the defendant was in custody), or a continuance of the trial date. *Holifield*, 170 Wn.2d at 237 (citing *Marks*, 114 Wn.2d at 730; *Wilson*, 149 Wn.2d at 12; *Koerber*, 85 Wn.App. at 4 FN 2; *Krenik*, 156 Wn.App. at 321; CP 4. Rather than turning to dismissal "only as a last resort," the trial court started there, ended there, and abused its discretion by doing so. *Holifield*, 170 Wn.2d at 237. As a result, this court should reverse the trial court's dismissal and reinstate the dismissed counts.

E. CONCLUSION

For the reasons argued above, the trial court's order dismissing counts 1 and 2 should be reversed and the counts reinstated.

DATED this 22nd day of April, 2015.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

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